IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LUCY DORANTES,	§	
Plaintiff,	§	
	§	
v.	§	**EP-02-CA-394-DB**
	§	
TEXAS TECH UNIVERSITY	§	
HEALTH SCIENCES CENTER AT EL	§	
PASO,	§	
Defendant	§	

MEMORANDUM OPINION AND ORDER

On this day, the Court considered a "Motion for Summary Judgment" filed by Defendant Texas Tech University Health Sciences Center at El Paso[1] in the above-captioned cause on March 6, 2003. On March 17, 2003, Plaintiff Lucy Dorantes filed a Response. On May 2, 2003, Plaintiff also filed a "Supplemental Brief in Opposition to Defendant's Motion for Summary Judgment" ("Plaintiff's Supplemental Brief"). After due consideration, the Court is of the opinion that Defendant's Motion for Summary Judgment should be granted.

BACKGROUND

Plaintiff began her employment with Defendant in 1987 when she was hired as a receptionist, and was eventually promoted to Senior Patient Service Specialist. In that capacity she supervised certain members of the front desk staff at the clinic where she worked. Plaintiff was working as a Senior Patient Service Specialist when she was discharged in November 2000.

Plaintiff originally brought the instant cause in state court in El Paso County, Texas, asserting one cause of action for retaliation pursuant to both the Texas Commission on Human Rights Act ("TCHRA"), TEX. LAB. CODE ANN. § 21.001 *et seq*., and Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2000e-17

[1] By Order entered on March 20, 2003, the Court dismissed with prejudice all claims against Defendant John Walls, the other named Defendant in this case.

("Title VII"), for retaliation. Specifically, Plaintiff asserts that, by discharging her, Defendant illegally and wrongfully retaliated against her in violation of § 21.055 of the Texas Labor Code and 42 U.S.C. § 2000e-3. Defendant removed the case to this Court on August 28, 2002, and filed an Answer on September 6, 2002. The instant Motion followed.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party that moves for summary judgment bears an initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavit, which it believes demonstrate the absence of a genuine issue of material fact. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). "If the moving party fails to meet this burden, the motion must be denied, regardless of the nonmovant's response." *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). If the movant does meet this burden, however, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *See, e.g., Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. "If the non-movant fails to meet this burden, then summary judgment is appropriate." *Tubacex,* 45 F.3d at 954.

When making a summary judgment determination, courts review the evidence and draw inferences therefrom in a light most favorable to the non-movant. *McInnis v. Alamo Cmty. Coll. Dist.,* 207 F.3d 276, 279 (5th Cir. 2000). The party opposing a motion supported by evidence cannot discharge his burden by alleging mere legal conclusions. *Anderson v. Liberty*

Lobby, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). Instead, the party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* Substantive law identifies which facts are material. *Id*. at 248.

Title VII prohibits employers from retaliating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C.A. § 2000e-3 (West 1994). The statute is often discussed in terms of the "opposition clause," which prohibits retaliation against an employee who opposes an employer's discriminatory actions, and the "participation clause," which prohibits retaliation for filing or stating an intent to file a discrimination complaint, or for participating in a discrimination investigation. *See Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 409 (1997). Similarly, the TCHRA prohibits retaliation against an employee who "(1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing." TEX. LAB. CODE ANN. § 21.055 (Vernon 1996). The law governing Title VII and TCHRA claims is nearly identical, and such claims are generally analyzed under Title VII precedent. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 n.10 (5th Cir. 2001) (citing *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 n.2 (5th Cir. 1999)). When a plaintiff brings a claim under both Title VII and the TCHRA, a court need not analyze it separately under each provision. *Id*.

A plaintiff who brings a claim of retaliation must establish a *prima facie* case by showing (1) that she engaged in protected activity; (2) that she suffered an adverse employment action; and (3) that there exists a causal connection between the protected activity and the adverse

employment action. *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002). In establishing her *prima facie* case at this stage of the litigation, a plaintiff need not show that the protected activity was the sole motivating factor for the adverse employment action. *Id.* (citing *Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996).

DISCUSSION

A. FACTS

The material facts in this case, as identified by the substantive law, are not in dispute. Plaintiff began having problems in her employment as far back as 1996–some four years before she was discharged.[2] These problems included poor working relationships with subordinates and other staff, lack of proficiency in assigned tasks, and failure to remedy her deficiencies through training and job performance counseling.

During the spring and summer of 2000, another round of problems arose regarding Plaintiff's job performance. During that time, in August 2000, Plaintiff approached her supervisor, Mr. John Walls, who was also the clinic director, to discuss her concerns over what Plaintiff perceived to be dissatisfaction among some employees stemming from their perception that Walls was having an affair with Senior Nurse Helen Jarvis, also an employee at the clinic, and from alleged favoritism shown to male employees. During that exchange, Plaintiff brought up the possibility of having an Equal Employment Opportunity Commission ("EEOC") workshop. She also reported to Walls that some employees were unhappy due to perceived favoritism resulting from Walls' and Jarvis' relationship, and told Walls that some employees had asked for the EEOC phone number. Also in August 2000, Plaintiff made

[2] Defendant asserts that trouble began in 1992, but only provides details of problems beginning in 1996.

statements to her staff that Walls had caused another employee to have a nervous breakdown, and that Walls could not properly supervise the staff because Walls and Jarvis were having an affair.

Meanwhile, Dr. Mary C. Spalding, who became Regional Chair and Associate Professor of Defendant's Department of Family and Community Medicine in 1998, had been aware of Plaintiff's numerous job performance deficiencies, which continued through the spring and summer of 2000. Dr. Spalding was not aware of any of the activity that Plaintiff now alleges constitutes protected activity. Based on Plaintiff's unsatisfactory job performance, Dr. Spalding sought Plaintiff's termination through the Texas Tech University Health Sciences Center Human Resources Department, to be effective not later than September 26, 2000. However, the Human Resources Department denied Dr. Spalding's request and directed her to afford Plaintiff an opportunity to improve her performance. From October 2, 2000 until November 17, 2000, Plaintiff underwent evaluation by another supervisor, Josie Najera. At the end of that period, Dr. Spalding reported to the Human Resources Department that Plaintiff remained deficient in her job skills and continued to be a source of stress for the employees she supervised. Dr. Spalding asked again for approval to terminate Plaintiff. This time, Human Resources agreed and Plaintiff was terminated effective November 25, 2000.

B. DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

The Parties do not dispute that Plaintiff suffered an adverse employment action when she was terminated. In its Summary Judgment Motion, however, Defendant asserts that Plaintiff has failed to establish a *prima facie* case of retaliation because she did not engage in protected activity. Defendant further argues that, even if Plaintiff did engage in protected

activity, she has failed to show a causal connection between that activity and her employment termination. The Court agrees with Defendant.

I. Plaintiff Did Not Engage in Protected Activity

In her Response to the instant Motion, Plaintiff describes her protected activities in the following words:

> 1. Communicating to her supervisor, John Walls, the need to have the EEOC come in to put on a program regarding discrimination. (Dorantes Depo, 162, 12-13; 163, 13-15) (Exhibit 1);
>
> 2. Advising John Walls of employee complaints regarding favoritism due to a consensual sexual relationship between Plaintiff's supervisor (Walls) and a coworker (Jarvis). (Dorantes Depo, 162, 15-24);
>
> 3. Advising supervisor of potential for EEOC complaints being filed as a result of the consensual sexual relationship between Walls and his subordinate Helen Jarvis. (Dorantes Depo, 162, 7-10).

The words "participate" and "oppose" are conspicuously absent from these descriptions.

The scope of activity protected under the "participation clause" is fairly broad. *See Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 409 (1997). For example, "participation clause" protection has been extended to protect employees who report employers on behalf of other employees. *Id*. (citing *Fielder v. Southco Inc.*, 699 F. Supp. 577, 578 (W.D. Va. 1988)). Also within the scope of activity protected by the "participation clause" are acts such as announcing an intent to file a charge, cooperating in an investigation, filing a charge, submitting affidavits during an EEOC investigation, testifying as a witness in court, and refusing to participate on behalf of an employer in a proceeding. 45A AM. JUR. 2D *Job Discrimination* § 227 (2002) (citations omitted). In its compliance manual, the EEOC also defines participation broadly, stating that "protection applies to individuals challenging employment discrimination under the statutes enforced by EEOC in EEOC

proceedings, in state administrative or court proceedings, as well as in federal court proceedings, and to individuals who testify or otherwise participate in such proceedings. Protection under the participation clause extends to those who file untimely charges." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (E.E.O.C.) NEW COMPLIANCE MANUAL § 8-IIC1 (2002) (citations omitted) (hereinafter, EEOC COMPLIANCE MANUAL). Plaintiff provides no evidence that she engaged in any of the activities described above. There was no complaint filed, nor was there any ongoing investigation or proceeding for Plaintiff to participate in. That being true, Plaintiff's conduct may be more properly addressed under the "opposition clause." *See* 45A AM. JUR. 2D *Job Discrimination* § 221 (2002) (citing *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253 (4th Cir. 1998) in distinguishing opposition from participation in the absence of any ongoing investigation or proceeding).

Protection under the "opposition clause" is somewhat limited. *See Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 409 (1997). Even so, acts as simple as making an internal complaint to a supervisor may be protected under the "opposition clause" provided that the complaint alleges some form of unlawful activity. *See Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (finding that employee's complaint to supervisor did not constitute protected activity under Title VII only because employee failed to allege that she had been sexually harassed). Opposition conduct may also include threatening to file a charge or other formal complaint, complaining to anyone about discrimination, refusing to obey an order because of a reasonable belief that it is discriminatory, and requesting reasonable accommodation or religious accommodation. EEOC COMPLIANCE MANUAL § 8-IIB2. The key to "opposition clause" protection, however, is that the employee must oppose some unlawful

activity. Again, Plaintiff falls short of showing that she did anything more than report to Walls her perception of the feelings of some other employees. Plaintiff never opposed anything.

A review of the deposition transcripts relied upon by Plaintiff belies her assertion that any of her activity amounted to opposition to discrimination. Nowhere in the excerpts of her deposition testimony does Plaintiff describe any exchange between herself and Walls during which Plaintiff voiced opposition to anything Walls had said or done. In fact, Plaintiff states in her deposition that the concerns she relayed to Walls were those of other staff members, not her own. Plaintiff does not claim to have told Walls that she disagreed with or otherwise opposed his alleged affair with Jarvis. Without stating her opinion on any of the issues, Plaintiff merely repeated to Walls what she claims other staff members said to her. Plaintiff cites to no cases, and the Court is aware of none, in which a court found that merely relaying the concerns of other employees, accurately or otherwise, amounts to opposition activity protected by Title VII.

Plaintiff also points to Walls' deposition testimony in which Walls confirms that someone told him that Plaintiff was advising individuals to possibly file an EEOC complaint. Walls clarifies his response, however, indicating that "there had been some comment made during a meeting that they had with the front desk people that said that EEOC might be an option to come in and look . . ." The deposition transcript excerpt Plaintiff submitted ends there, and the Court finds that this statement alone is insufficient to show that Plaintiff participated in any investigation or proceeding, or opposed any unlawful activity.

Finally, Plaintiff contends that she engaged in protected activity when she informed Walls that other employees wanted to call the EEOC. In her deposition, Plaintiff testifies that she asked Walls, "Do you want me to give them the number of the EEOC?" Plaintiff further testified that Walls then asked her if she was threatening him. Plaintiff testified

that she responded as follows:

> I told him, No, John, I'm not threatening you. You know, I'm just - - I just wanted to bring it to your attention. You're my supervisor. I brought it to your attention. You know, I mean, they are saying that you have been unprofessional and that Helen [Jarvis] is acting unprofessionally, and *I'm just telling you*. (Emphasis added.)

Here, Plaintiff actually distances herself from any appearance of opposition by her closing caviat, emphasized above in italics.

Plaintiff also points to a Disciplinary Counseling Record dated September 29, 2000, that Walls prepared on Plaintiff.[3] The Counseling Record was developed as a result of employee complaints about Plaintiff, including her supervisory responsibility and her inability to perform certain functions at the front desk of the clinic in which she worked. Addressing Plaintiff in the Disciplinary Counseling Record, Walls states: "During meetings that you conducted as a supervisor it was reported that you made harmful, false and inappropriate statements to your staff." During his deposition, Walls was asked: "What was stated that was harmful?" Walls replied: "The accusations of improprieties between Helen [Jarvis] and myself, the enticement to file an EEOC complaint, the insinuation, or the comment made that she was not going to be worked to the point so that she has a nervous breakdown, like Myrna Chir had had." Apparently, in their statements to Walls, Plaintiff's subordinates had complained about Plaintiff's accusations and her apparent attempts to get them to file EEOC complaints against Walls and/or Jarvis–something Plaintiff herself never did until she filed her retaliation claim that lies at the base of this case. The Court is unpersuaded that attempting to convince others to file an EEOC complaint when they are not inclined to do so constitutes protected activity.

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[3] Notably, the Counseling Record was prepared after Dr. Spalding made her first request to the Human Resources Department to terminate Plaintiff.

The Court finds that the activity that Plaintiff asserts is protected amounts to no more than Plaintiff informing her supervisor of the intentions of *other* employees and asking him what he wanted her to do. Plaintiff does not show that she opposed any unlawful practice, nor does she show that she participated in any investigation, proceeding, or hearing, or filed a charge, or even made an internal complaint. Therefore, the Court finds that Plaintiff has not met her burden of establishing a *prima facie* case of retaliation because she has not shown that she engaged in any protected activity.

II. No Causal Connection

Defendants assert, and the Court agrees, that even if Plaintiff did engage in activity protected under Title VII and the TCHRA, Plaintiff has failed to show any causal connection between that activity and her termination.

The record is quite clear. The decision to terminate Plaintiff was made by Dr. Spalding, not Walls, who was unaware of any of the alleged protected activity at the time she made the termination request. Moreover, Plaintiff was not terminated until after the first request was denied by the Human Resources Department. The second request was approved only after a failed remedial evaluation period and a final review of Plaintiff's performance record. Even though the termination decision was made within a couple of months of the time Plaintiff asserts she engaged in protected activity, Dr. Spalding based the action on Plaintiff's long track record of poor performance and subsequent failure to improve in the face of potential termination. There is no evidence to suggest that Dr. Spalding merely rubber-stamped a recommendation from Walls. *See Long v. Eastfield College*, 88 F.3d 300, 309 (5th Cir. 1996) (finding that a causal connection would remain intact if a termination decision was merely a "rubber stamp" of the recommendation of a discriminating supervisor). The fact remains that the recommendation

to terminate Plaintiff was made by Dr. Spalding, who was unaware of any of the protected activity in which Plaintiff allegedly engaged. Therefore, the Court finds that Plaintiff has failed to show the requisite causal connection between the termination decision and Plaintiff's alleged protected activity.

CONCLUSION

The Court finds that Plaintiff has failed to establish a *prima facie* case of retaliation because Plaintiff has not shown that she engaged in any activity protected by Title VII or the TCHRA, nor has Plaintiff shown that she was terminated in retaliation for her alleged protected activity. Therefore, the Court is of the opinion that Defendant's Motion for Summary Judgment should be granted.

Accordingly, **IT IS HEREBY ORDERED** that the "Motion for Summary Judgment" filed by Defendant Texas Tech University Health Sciences Center at El Paso is **GRANTED**.

IT IS FURTHER ORDERED that all other pending motions, if any, are **DENIED AS MOOT**.

SIGNED this **23rd** day of **June, 2003**.

THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE